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No. 97-795

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

THE PINAL CREEK GROUP, consisting of CYPRUS MIAMI MINING CORPORATION, INSPIRATION CONSOLIDATED COPPER COMPANY, and BHP COPPER INC.,

Petitioners,

v.

NEWMONT MINING CORPORATION, OCCIDENTAL PETROLEUM CORPORATION, CANADIANOXY OFFSHORE PRODUCTION COMPANY, and ATLANTIC RICHFIELD COMPANY,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

SUPPLEMENTAL BRIEF

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TABLE OF AUTHORITIES

Cases Page

Bennett v. Spear, 117 S. Ct. 1154 (1997) 8
Calhoon v. Harvey, 379 U.S. 134 (1964) 2
Connecticut Nat'l Bank v. Germain, 503 U.S. 249 (1992) 9,10
Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469 (1992) 7
Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640 (1981) 2
National Am. R.R. Passenger Corp. v. BPJ Int'l, No. 95-56734 (9th Cir. 1997) 6
Newport v. Fact Concerts, Inc., 453 U.S. 247 (1981) 2
Salinas v. United States, 118 S. Ct. 469 (1997) 8
Sturges v. Crowninshield, 4 Wheat. 122 (1819) 9

Statutes

28 U.S.C. § 158(d) 9,10
28 U.S.C. § 1292 9,10
42 U.S.C. § 9606(b)(2)(C) 9
42 U.S.C. § 9620(a)(1) 5
40 C.F.R. Part 300, App. B, Table 2 5

Legislative History

132 Cong. Rec. 14902-03 (1986) 6

Rule

S. Ct. Rule 15.8 1

Other

Ivy Barton-Wagner, Setting CERCLA Straight: A Solution to the Dispute over Actions by Liable Remediators Under 107 and 113, 14 Temp. Envtl. L. & Tech. J. 207 (1995) 3
Michael V. Hernandez, Cost Recovery or Contribution: Resolving the Controversy Over CERCLA Claims Brought By Potentially Responsible Parties, 21 Harv. Envtl. L. Rev. 83 (1997) 3

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Petitioners submit this Supplemental Brief pursuant to S. Ct. Rule 15.8 to respond to the brief filed by the Solicitor General in response to this Court's invitation. See 118 S. Ct. 1116 (1998).

1. The Solicitor General argues against certiorari on the ground that there is no direct conflict among the circuits. SG Br. 6. As we noted in the petition, petitioners' position has not prevailed at the circuit level. See Pet. 13-14. Nevertheless, a number of factors combine to render that consideration less significant here than in the typical case:

First, there is no dispute that the district courts are hopelessly divided, as several courts have expressly noted. See Pet. 8 n.4 (citing cases noting conflict). This Court has granted certiorari to resolve conflicts between district and appellate courts, where, as here, those differences indicate confusion among the lower courts on an important question of law. See, e.g., Calhoon v. Harvey, 379 U.S. 134, 137 & n.10 (1964); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 646 n.9 (1981); Newport v. Fact Concerts, Inc., 453 U.S. 247, 257 n.14 (1981).

Second, the Solicitor General surely goes too far in speaking of "[t]he uniformity among the courts of appeals." SG Br. 7. The circuits have embraced a bewildering array of competing rationales -- a not surprising consequence of abandoning adherence to the plain language of the statute. See Pet. 14-20.

Some circuits hold that Sections 107 and 113 are separate remedies, and potentially responsible parties ("PRPs") may proceed only under Section 113. Others hold that PRPs may bring an action under Section 107, but that the action is governed by Section 113. This split makes a difference in deciding whether particular features of the statutory scheme that are different under Sections 107 and 113 (such as the applicable statute of limitations and the availability of certain defenses) apply to the action. The Seventh Circuit has attempted to ameliorate the adverse impact of a ruling that PRPs may not proceed under Section 107 by rewriting the statute even further, and holding that "blameless" PRPs may bring such an action. All the confusion caused by these divergent and multiplying theories is of course eliminated by petitioners' plain language reading.

Third, commentators have agreed that the decided cases are "muddled and conflicting," Michael V. Hernandez, Cost Recovery or Contribution: Resolving the Controversy Over CERCLA Claims Brought By Potentially Responsible Parties, 21 Harv. Envtl. L. Rev. 83, 135 (1997), and that "prompt resolution of this issue is vital." Ivy Barton-Wagner, Setting CERCLA Straight: A Solution to the Dispute over Actions by Liable Remediators Under 107 and 113, 14 Temp. Envtl. L. & Tech. J. 207, 208 (1995).

Fourth, although the United States may be content with the unsettled state of the law, the States and cities are not, and have joined petitioners in urging this Court to grant review. See Br. for the State of Alabama, et al., as Amici Curiae in Support of Petitioners. This is particularly significant because the lion's share of responsibility for seeing to the cleanup of contaminated sites across the country rests not with the Federal Government, but with the States and local government.

Fifth, at least when it was in their interests to do so, respondents themselves acknowledged that the issue was "hotly debated and inconsistently resolved both within the Ninth Circuit and around the country." See Pet. 5-6 (quoting respondents' motion seeking interlocutory appeal).

Sixth, the existing state of confusion is particularly unacceptable in the context of the administration of an important and time-sensitive federal statutory program. Nearly two decades after CERCLA's enactment, the meaning of the key liability provision is unsettled and will remain so unless this Court acts. For the reasons explained in the Petition (at 27-30) and in the States' Amicus Brief (at 10-16), the unsettled state of the law on the question presented frustrates the achievement of CERCLA's goal of encouraging the prompt cleanup of contaminated sites.

Awaiting a direct circuit conflict before resolving the acknowledged confusion in the lower courts would simply perpetuate that frustration of Congress' important objectives.

2. The Solicitor General suggests that the question presented is not important enough to merit the Court's attention, SG Br. 9, a judgment with which the States, municipalities, and commentators disagree. In announcing this policy judgment, the Solicitor General neglects to alert the Court to the fundamental conflict of interest the United States faces under CERCLA. For while the Federal Government has enforcement responsibilities under CERCLA, it is also far and away the Nation's worst polluter -- more responsible for contamination at CERCLA sites than any other entity -- and is itself subject to liability under CERCLA. 1/

CERCLA expressly provides that the United States is liable under its terms "in the same manner and to the same extent" as private entities. 42 U.S.C. § 9620(a)(1). The Solicitor

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1/ The National Priorities List -- EPA's list of federal Superfund sites -- includes a federal facilities section with 151 Department of Defense, Energy, and Interior sites. 40 C.F.R. Part 300, App. B, Table 2. In addition, EPA estimates that the Department of Defense is responsible for more than 21,000 potentially contaminated sites, Energy for 10,000, and Interior for 26,000. EPA, Federal Facilities Restoration and Reuse Office, http://www.epa.gov./swerffrr.

General's position on the question presented -- restricting the right of private parties voluntarily undertaking a cleanup to recover their response costs from other responsible parties -- reflects more the Federal Government's position as a likely defendant than its position as an enforcer of CERCLA's provisions or an advocate for the prompt cleanup of contaminated sites. 2/

There is of course nothing wrong with the Solicitor General taking into account the need to defend his client in actions brought under CERCLA in determining what the position of the United States should be on the merits and whether review by this Court is appropriate, but the Court should appreciate that Congress had different considerations in mind when it subjected the Federal Government to liability, and has been pointedly critical of the Federal Government's responsiveness to the concerns underlying CERCLA. See, e.g., 132 Cong. Rec. 14902-03 (daily ed. Oct. 3, 1986) (Federal facilities tend to respond "slowly and tentatively" to even the "most notorious situations;"

2/ The United States has been more candid in prior filings, noting before the Ninth Circuit, for example, that "the United States is involved as a responsible party at many CERCLA sites and is often perceived as a 'deep pocket.'" Br. Amicus Curiae in National Am. R.R. Passenger Corp. v. BPJ Int'l, No. 95-56734 (9th Cir. 1997).

"[n]o loophole, it seems, is too small to be found by the Federal Government") (Sen. Stafford).

3. On the merits, the Solicitor General begins his statutory analysis by invoking a "familiar general principle" found in authorities such as the Restatement, the Uniform Laws, and Black's Law Dictionary, and suggests that resolving the question presented calls upon courts to "reconcil[e]" and "make sense" out of different statutory provisions enacted over time. SG Br. 7, 11.

That is conspicuously not the approach to statutory interpretation adopted by this Court. This Court has reiterated time and again that "[i]n a statutory construction case, the beginning point must be the language of the statute," Estate of Cowart v. Nicklos Drilling Co., 505 U.S. 469, 475 (1992) -- not "general principle[s]" drawn from outside the legislative process.

There is in any event no need to address the common law principles the Solicitor General invokes concerning joint and several liability. The statute itself explicitly defines the recovery available under Section 107 in plain terms: "any other person" may recover "any * * * costs of response" it incurred in a cleanup consistent with the national contingency plan. The

language is not only plain, it is exceptionally broad -- any person, any costs of response. See Bennett v. Spear, 117 S. Ct. 1154, 1162 (1997) (phrase "any person," though of "remarkable breadth," should be taken at "face value"); Salinas v. United States, 118 S. Ct. 469, 473 (1997) ("The word 'any' * * * undercuts the attempt to impose [a] narrowing construction.").

The Solicitor General, however, argues that some persons may not bring an action under Section 107 to recover any response costs they incurred. Reading exceptions into the statute that cannot be found in the plain language, the Solicitor General argues that petitioners cannot be considered "any person" entitled to recovery under Section 107 because they are themselves responsible parties liable for cleanup costs, and therefore are limited to an action for contribution under Section 113. This, according to the Solicitor General, is because of the "familiar general principle" that "jointly responsible parties may obtain an equitable allocation of their common liability through the mechanism of a contribution claims." SG Br. 7.

When Congress wanted to limit rights of action under CERCLA to parties who were not liable for cleanup costs, however, it did so expressly. Thus, Section 106 affords a right of action for recovery of costs incurred by parties conducting a cleanup

pursuant to EPA order, but Congress expressly limited the remedy to a party who can "establish * * * that it is not liable for response costs under section [107(a)]." 42 U.S.C. § 9606(b)(2)(C). The Solicitor General's construction would read into Section 107 a similar limitation that Congress did not enact.

The Supreme Court cautioned against just such judicial revision 180 years ago: "It would be dangerous in the extreme to infer * * * that a case for which the words of an instrument expressly provide, shall be exempted from its operation." Sturges v. Crowninshield, 4 Wheat. 122, 202 (1819) (quoted in Connecticut Nat'l Bank v. Germain, 503 U.S. 249, 254 (1992)). Germain is, in many respects, quite similar to this case. The Court was confronted in that case with two statutory provisions arguably governing the jurisdiction of the federal courts of appeals over bankruptcy cases. A specific bankruptcy provision, 28 U.S.C. § 158(d), authorized appeal only of final judgments. A general provision, 28 U.S.C. § 1292, conferred jurisdiction on the courts of appeals to review certain types of interlocutory orders. Just as the Solicitor General here argues that Sections 107 and 113 can be "reconcile[d]" by reading the contribution limits in Section 113 into the general right of action provided

by Section 107, so too the respondent in Germain argued that the limits of 28 U.S.C. § 158(d) must be implicitly incorporated into 28 U.S.C. § 1292.

This Court resoundingly rejected that approach to statutory construction. The plain language of Section 1292 gave the right to appeal certain interlocutory orders, with no exception in the statute for bankruptcy cases, and this Court refused to read such an exception into the statute. "Redundancies across statutes are not unusual events in drafting, and so long as there is no 'positive repugnancy' between two laws, a court must give effect to both." 503 U.S. at 253 (citation omitted). So too here a court can give effect to the plain language of both Section 107 and 113; there is no need to depart from the broad and unrestricted text of Section 107 because of the existence of Section 113, and no basis for restricting Section 107 because of alleged "general principle[s]" found elsewhere in the law.

4. The Federal Government concludes its brief with a transparent attempt to muddy the waters by discussing a consent decree submitted by the State of Arizona and petitioners in a separate case, but not yet approved by the district court. SG Br. 16. The consent decree cannot and does not have any effect on the pertinent facts in the present case or on the applicable

law. Contrary to the Solicitor General's suggestion, the consent decree does not provide petitioners complete contribution protection for all their cleanup costs. The Solicitor General's objections are therefore misplaced and do not concern the question before the Court.

That question -- whether petitioners may bring a claim under Section 107 of CERCLA, assuming the truth of their allegations -- is purely a question of statutory interpretation. The court below, like other circuit courts, see Reply Br. 3, recognized the importance of that issue and the unsettled state of the law in granting an interlocutory appeal. This Court should grant certiorari to resolve the question and bring needed clarity to an issue affecting the cleanup of thousands of contaminated sites across the country.

CONCLUSION

For the foregoing reasons, and those in the petition and the brief of amici curiae States and municipalities, the petition should be granted.

Respectfully submitted,

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